IN THE
MISSOURI SUPREME COURT

---

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | No. SC 87604 |
| | ) | |
| SAMUEL L. JUSTUS, | ) | |
| | ) | |
| Appellant. | ) | |

---

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DAVIESS COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE BARBARA G. LAME, JUDGE

---

# APPELLANT'S SUBSTITUTE REPLY BRIEF

---

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594
E-mail: Ellen.Flottman@mspd.mo.gov

**INDEX**

Page

## TABLE OF AUTHORITIES

Page

***CASES*:**



***CONSTITUTIONAL PROVISIONS*:**



***STATUTES*:**

## JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his initial brief.

## STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his initial brief.

## POINT RELIED ON

**The trial court erred and abused its discretion in overruling defense counsel's objections, admitting the hearsay statements of the alleged child victim, Sara Justus, to DFS child abuse and neglect investigator Cynthia Debey and forensic examiner Joyce Estes, and admitting the videotaped interview of Sara by Ms. Estes, because admission of that hearsay violated appellant's right to confront and cross-examine the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the face-to-face confrontation guaranteed by Article I, Section 18(a) of the Missouri Constitution, in that the statements were testimonial hearsay and defense counsel had no prior opportunity to cross-examine Sara, the child declarant; or in the alternative, in that there were insufficient indicia of reliability to admit the out-of-court statements under Section 491.075 since the statements were the result of leading questions.**

***Crawford v. Washington,*** 541 U.S. 36 (2004);

***Davis v. Washington***, 126 S.Ct. 2266 (2006);

***State v. Snowden***, 867 A.2d 314 (Md. 2005);

***State v. Wideman***, 940 S.W.2d 18 (Mo. App., W.D. 1997);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sec. 18(a); and

Section 491.075.

## ARGUMENT

**The trial court erred and abused its discretion in overruling defense counsel's objections, admitting the hearsay statements of the alleged child victim, Sara Justus, to DFS child abuse and neglect investigator Cynthia Debey and forensic examiner Joyce Estes, and admitting the videotaped interview of Sara by Ms. Estes, because admission of that hearsay violated appellant's right to confront and cross-examine the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the face-to-face confrontation guaranteed by Article I, Section 18(a) of the Missouri Constitution, in that the statements were testimonial hearsay and defense counsel had no prior opportunity to cross-examine Sara, the child declarant; or in the alternative, in that there were insufficient indicia of reliability to admit the out-of-court statements under Section 491.075 since the statements were the result of leading questions.**

### *The hearsay at issue is testimonial*

Under ***Crawford v. Washington,*** 541 U.S. 36 (2004), a "testimonial" statement is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 124 S.Ct. at 1364. The best analysis of whether child victim hearsay is testimonial is in ***State v. Snowden***, 867 A.2d 314 (Md. 2005). The child victim hearsay was testimonial because the interviews were initiated and conducted as part of a formal law enforcement investigation; the

social worker knew of the allegations and the identity of the suspect; and most importantly, the express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial. ***Id***. at 325. The social worker's "dual roles as interviewer and ultimate witness for the prosecution confirm her function as an arm of the police investigation in this case." ***Id***. at 327.

Contrary to the state's argument (Resp. Br. at 28), it is the intention of the *interviewer* which governs whether hearsay is testimonial, not the belief of the witness. As the ***Snowden*** Court noted, "even if we were inclined to ignore the children's actual awareness of the purpose of the interviews, any argument as to the logistics or style of the interviews blatantly disregards the undeniable fact that the express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial." 867 A.2d at 326, *citing* ***State v. Bobadilla***, 690 N.W.2d 345, 349 (Minn. Ct. App. 2004) (finding that because "the interview was conducted for [the] purpose of developing a case against [the defendant], … the answers elicited were testimonial in nature").

In discussing the issue, respondent cites the new United States Supreme Court case of ***Davis v. Washington***, 126 S.Ct. 2266 (2006) (Resp. Br. at 28). Respondent fails to point out that ***Davis*** addressed the question left open in ***Crawford***: what is testimonial?

***Davis v. Washington***

In ***Davis*** and its companion case ***Hammon***, the United States Supreme Court considered whether interrogation by a 911 dispatcher produced testimonial hearsay when the answers to the questions were admitted at trial. The Court did not classify "all conceivable statements" but defined "testimonial" for those purposes as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S.Ct. at 2273-2274. The Court noted that the holding referred to interrogations, but said that interrogations were not limited to law enforcement officers, and "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." ***Id***. at 2274, n. 2. So too, appellant asserts, are forensic examiners, taking a statement for purposes of litigation. This is made clear later in the ***Davis*** opinion. Justice Scalia discussed that in ***Crawford***, the Court had in mind

> interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The

product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.

***Id.*** at 2276.

Ultimately, the Court distinguished testimonial from nontestimonial with a simple formula: whether the declarant was speaking about events as they were actually happening, or whether the declarant was describing past events. ***Id***. After the events are over, such statements are testimonial as an "obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." ***Id***. at 2278, emphasis in original.

Sara's statements to Cynthia Debey and Joyce Estes, both oral and videotaped, were testimonial hearsay. Both Ms. Debey, who testified that she "works with law enforcement to interview the children" and Ms. Estes, who testified that she performs "forensic interviews" which she defined as "an official legal interview done for law enforcement," were ultimate witnesses for the prosecution which confirms their function as an arm of the police investigation. See ***Snowden,*** 867 A.2d at 327. Under the United States Supreme Court's definition in ***Davis***, the statements to Ms. Debey and Ms. Estes were testimonial.

***Sara was unavailable***

The trial court found that Sara was unavailable (L.F. 114). Respondent argues that because appellant "caused her to be unavailable," he has waived his

Confrontation Clause rights (Resp. Br. at 45-46). Of course, this begs the question. The point of the trial was to determine whether appellant molested Sara. It cannot be assumed that he did to determine the admissibility of evidence in that trial.

If respondent's argument were correct, then no hearsay by an unavailable victim could ever violate the Confrontation Clause. No victim could be more unavailable than a murder victim. Yet in ***State v. Bell***, 950 S.W.2d 482 (Mo. banc 1997), this Court reversed the defendant's murder conviction and death sentence where hearsay of the victim that the defendant had previously abused her was improperly admitted against him.

While ***Crawford*** does recognize and accept the principal of forfeiture, 541 U.S. at 62, it leaves for another day how that principal is to be applied. As ***Crawford*** holds, the Confrontation Clause is a procedural rather than a substantive guarantee, commanding "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. Sara was unavailable not in the sense that appellant kept her from appearing in court, but in the sense that a psychologist believed she would be afraid to testify (Tr. 21-22). Yet that could be said of almost any four-year-old girl, or any alleged sex victim. This is not the sort of situation in which to apply the principal of forfeiture.

The state's position has not been the rule under Section 491.075, which also requires that the witness be unavailable. In ***State v. Wideman***, 940 S.W.2d 18

(Mo. App., W.D. 1997), the State stipulated that the three-year-old victim was present and available to testify, but elected, under the general unavailability provision of section 491.075.1(2)(b), to use only her out-of-court statements at trial, which were introduced into evidence through several witnesses. 940 S.W.2d at 20. On appeal, the State conceded that the trial court erred in admitting the victim's hearsay statements under section 491.075.1(2)(b), because that statute "is restricted to circumstances in which a child witness is either physically unavailable to testify at trial, or is deemed unavailable due to lack of responsiveness on the witness stand." ***Id.*** This court reversed the defendant's sodomy conviction and remanded for a new trial, holding that since the trial court made no findings on the trauma issue, the victim's hearsay statements to others could not be admitted under the psychological and emotional trauma provision of Section 491.075.1(2)(c). ***State v. Sanders,*** 126 S.W.3d 5, 16 (Mo. App., W.D. 2003), *citing,* ***Wideman****,* 940 S.W.2d at 20.

Sara's statements to Ms. Debey and Ms. Estes were testimonial. Appellant had no opportunity to confront Sara face to face to challenge her accusations. Sara's hearsay statements were inadmissible under ***Crawford***. Without the hearsay admitted against appellant, the case would consist only of the grandmother's testimony. Prejudice is clear. This Court must therefore reverse appellant's conviction of first degree child molestation and remand for a new trial.

## CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

_____
Ellen H. Flottman, MOBar #34664
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone: (573) 882-9855
FAX: (573) 875-2594
E-mail: Ellen.Flottman@mspd.mo.gov

## Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 1,781 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in July, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 19th day of July, 2006, to Karen Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri, 65102.

_____

Ellen H. Flottman